

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service:)
Promoting Deployment and)
Subscribership in Unserved)
And Underserved Areas, Including)
Tribal and Insular Areas)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYCOMMENTS OF THE WESTERN ALLIANCE

The Western Alliance, by its attorney, hereby submits comments with respect to paragraphs 77 and 78 of Section IV ("Designating Eligible Telecommunications Carriers Pursuant To Section 214(e)(6)") of the Further Notice Of Proposed Rulemaking, FCC 99-204, which was released in the captioned proceeding on September 3, 1999 ("FNPRM").

The Western Alliance opposes any attempt to expand the very limited jurisdiction of the Commission over proceedings for the designation of Eligible Telecommunications Carriers ("ETCs") on certain tribal lands to encompass proceedings involving the potential designation of wireless and satellite carriers as ETCs on a statewide, regional or national basis. With the sole exception of carriers serving certain tribal lands exempted by treaty from the jurisdiction of a state commission, Congress gave state commissions the sole authority to determine whether any and all telecommunications carriers, including terrestrial wireless and satellite carriers, should be designated as ETCs. State commissions continue to have the resources and expertise to make

these determinations, and should not be superseded or displaced by the Commission.

The Western Alliance

The Western Alliance is a consortium of the member companies of the Western Rural Telephone Association (WRTA) and the Rocky Mountain Telecommunications Association (RMTA). It represents approximately 250 rural telephone companies serving sparsely populated farming and ranching areas, remote mountain and desert communities, and Native American reservations west of the Mississippi River. Neither large local exchange carriers nor wireless carriers have ever shown any significant or sustained interest in serving the most rural portions of these areas.

Western Alliance members are generally small businesses serving less than 3,000 access lines. The typical member serves less than 500 subscribers per exchange and less than 3.24 subscribers per route-mile. Members have been required by their "carrier of last resort" status to install and maintain lengthy loops (10-to-25 miles, and sometimes as much as 40-to-50 miles) over rough and unpopulated terrain to serve remote customers.

Because of their small size, high costs and limited subscriber and revenue bases, Western Alliance members rely significantly upon existing federal access charge and Universal Service Fund (USF) revenues. They, therefore, have a substantial interest in the mechanisms and procedures employed to calculate and distribute USF support, including the designation of ETCs.

**State Commissions Have Jurisdiction Over
The Designation of Eligible Telecommunications Carriers**

Section 214(e)(2) of the Communications Act expressly gives each State commission the jurisdiction and responsibility, upon its own motion or upon request, to designate a common carrier that offers and advertises the services supported by federal universal service support mechanisms "as an eligible telecommunications carrier for a service area designated by the State commission."

The initial Senate version of the Telecommunications Act of 1996 (S. 652) gave the Commission jurisdiction to designate "essential telecommunications carriers" for interstate services, and gave the States jurisdiction to designate "essential telecommunications carriers" only for intrastate services. Conference Report (H. Rept. 104-458), 142 Cong. Record H1078, H1114 (January 31, 1996). However, the Commission's jurisdiction was eliminated by the Conference Committee. The final version of Section 214(e)(2) gave state commissions the sole and entire jurisdiction: (a) to designate the carriers eligible to receive federal universal service support; and (b) to designate the service areas applicable to federal universal service obligations and support mechanisms.

The Eligible Telecommunications Carriers Act of 1997 (S. 1354), which added Section 214(e)(6) to the Communications Act, did not give the Commission any jurisdiction over the designation of terrestrial wireless carriers or satellite carriers as ETCs throughout the United States. Rather, its limited intent was to

allow tribally owned carriers not regulated by a state commission to continue to receive federal universal service support.

At the time that he introduced S. 1354 on October 31, 1997, Senator John McCain stated:

Universal Service provides intercarrier support for the provision of telecommunications services in rural and high-cost areas throughout the United States. However, Section 254(e) of the 1996 Act states that only an eligible carrier designated under Section 214(e) of the Communications Act shall be eligible to receive specific federal universal service support after the FCC issues regulations implementing the new universal service provisions into law. Section 214(e) does not account for the fact that State commissions in a few states have no jurisdiction over certain carriers. Typically, States also have no jurisdiction over tribally owned companies which may or may not be regulated by a tribal authority that is not a State commission per se.

The failure to account for these situations means that carriers not subject to the jurisdiction of a State commission have no way of becoming an eligible carrier that can receive universal service support. This would be the case whether these carriers are traditional local exchange carriers that provide services otherwise included in this program, have previously obtained universal service support, or will likely be the carrier that continues to be the carrier of last resort for the customers in the area.

Mr. President. This simple amendment will address this oversight within the 1996 act, and prevent the unintentional consequences it will have on common carriers which Congress intended to be covered under the umbrella of universal service support. Cong. Record S11546 (October 31, 1997).

During the consideration and adoption of S. 1354 in the House of Representatives, it was repeatedly stated and emphasized by the Congressmen supporting it that the purpose of Section 214(e)(6) was to enable tribally-owned carriers serving tribal lands outside the jurisdiction of a state commission to continue to receive federal universal service support. There was no express or implied indication that this very limited provision gave the Commission any

jurisdiction to designate wireless carriers or satellite carriers as ETCs on a nationwide or regional basis.

For example, House Commerce Committee Chairman Thomas J. Bliley, Jr. stated:

Under the current universal service provisions of the Communications Act, only common carriers designated by the States are eligible to receive Federal universal service support. Unfortunately, this policy ignores the fact that some common carriers providing service today are not subject to the jurisdiction of a State commission, most notably, some carriers owned or controlled by native Americans. Thus, many of these common carriers may lose Federal support on January 1, 1998, unless Congress takes action.

S.1354 corrects this problem by permitting a carrier that is not subject to State authority to be designated by the Federal Communications Commission as eligible to receive Federal universal service support. S.1354 will apply to only a limited number of carriers, but to those carriers' customers, it will be significant. Cong. Record H10807 (November 13, 1997).

Representative J. D. Hayworth of Arizona stated:

Madam Speaker, as the chairman mentioned, this bill corrects a technical glitch in section 214(e) of the Communications Act of 1934 that has created a serious problem for certain telecom carriers, particularly some Indian tribes. The current language of section 214(e) does not account for the fact that State commissions in some States have no jurisdiction over certain carriers. Some, not all, but some States have no jurisdiction over tribal-owned carriers, which may or may not be regulated by a tribal authority that is not a State commission per se. This is especially true in my home State of Arizona and also in South Dakota.

The failure to account for this situation means that such carriers have no way of being designated as a carrier eligible to receive Federal universal service support which provides intercarrier support for the provision of telecommunications services in rural and high-cost areas throughout the United States.

Section 214 as currently written does not consider whether a tribal-owned carrier is a traditional incumbent local exchange carrier that provides the core universal services, whether they have previously received Federal universal service

support or whether they will be deemed a carrier of last resort to serve every customer in their service area.

In my home State of Arizona, there are four tribal authority telephone cooperatives that are not subject to State jurisdiction. Passing this bill would ensure that these entities can continue to serve their customers as eligible carriers.

Without this bill, Madam Speaker, customers of these carriers could face enormous rate increases. For instance, if Gila River in my district in Arizona lost its Federal universal service support, its customers would be hit with a \$32 monthly charge per subscriber starting this January, so it is critical that we pass this bill now to protect these customers. Cong. Record H10808 (November 13, 1997).

Representative Edward J. Markey of Massachusetts followed by declaring:

The Telecommunications Act of 1996 stipulated that State commissions are authorized to designate which telephone companies are so-called eligible telecommunications carriers for purposes of universal service funding. The provisions of the Telecommunications Act, however, did not account for the fact that in a few instances, States have no jurisdiction over telephone companies owned by certain federally-recognized Indian tribes. Because States have no jurisdiction in this area, such companies would have no way of becoming designated as eligible telecommunications carriers and receive universal service support. Id.

Finally, just prior to passage of S.1354 by the House, Representative W. J. Tauzin of Louisiana stated:

This bill would clarify a provision of the Communications Act regarding universal service. A change in the existing law is necessary to ensure that local telephone rates for Native Americans, and possibly other consumers, do not rise.

Failure to enact S.1354 may force rates to increase for local telephone service in many Native American communities as a result of certain carriers being excluded from the definition of an "eligible telecommunications carrier" under the Communications Act. S.1354 makes a technical correction to the Act that will make it possible for telephone companies

serving areas not subject to the jurisdiction of a State Commission to be eligible to receive federal Universal Service support. This support will be necessary to keep local telephone rates affordable in these areas.

Supporting S.1354 at this time is critical because federal support for many of these carriers that serve Native Americans may run out as early as January 1, 1998. Cong. Record H10909 (November 13, 1997).

Hence, the legislative history of Section 214(e)(6) demonstrates that it gave the Commission very limited jurisdiction over the designation of ETCs in only a very narrow set of circumstances. The scope of the subsection was circumscribed to that small number of geographic areas -- primarily, in Arizona and South Dakota -- where tribally-owned local exchange carriers serving tribal lands outside the jurisdiction of a State Commission would lose their existing federal universal service support because no entity had jurisdiction to designate them as an ETC.

Neither the language nor the legislative history of Section 214(e)(6) give the Commission any explicit or implicit authority to designate ETCs on the basis of the nature of the service - or, particularly, to designate terrestrial wireless carriers and/or satellite carriers as ETCs on a national or regional basis.

Unlike carriers owned by certain federally-recognized tribes, terrestrial wireless carriers and satellite carriers are **not** wholly outside the regulatory jurisdiction of State commissions. Rather, Section 332(c)(3) of the Communications Act [which was adopted in 1993, four years prior to Section 214(e)(6)] expressly retains for the States the right to regulate

the terms and conditions (other than entry and rates) of commercial mobile services. The legislative history of Section 332(c)(3) noted that by "terms and conditions" Congress intended to include, inter alia, such matters as "consumer billing information and practices and billing disputes and other consumer protection matters." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261. Moreover, Section 332(c)(3) also expressly states that nothing therein "shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

It is well settled that administrative agencies cannot enlarge or relinquish their statutory jurisdiction. Atchison, Topeka and Santa Fe Railway Company v. Interstate Commerce Commission, 607 F.2d 1199, 1203 (7th Cir. 1979); Fort Pierce Utilities Authority v. United States, 606 F.2d 986, 995 (D.C. Cir. 1979). Here, Congress has given the Commission only very narrowly limited jurisdiction to designate ETCs for certain tribal lands that have been exempted from the jurisdiction of a state commission. Congress has not given the Commission any express or implied jurisdiction to designate terrestrial wireless carriers and/or satellite carriers as ETCs on a national or regional basis. The Commission may not seize such jurisdiction for itself.

Conclusion

Therefore, in response to the Commission's inquiry in paragraphs 77 and 78 of Section IV of the FNPRM, the Western Alliance states that the Commission does **not** have jurisdiction to designate terrestrial wireless carriers and/or satellite carriers as ETCs on a state, regional or national basis. Rather, Congress has given state commissions the sole and entire jurisdiction over the designation of terrestrial wireless carriers, satellite carriers, and other telecommunications carriers as ETCs. The only exception to this state commission jurisdiction is the narrowly limited, geographic area jurisdiction granted to the Commission in Section 214(e)(6) over the designation of ETCs on certain tribal lands exempt from state commission jurisdiction.

Respectfully submitted,
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